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August 17, 2009

Ms. LaDonna Castañuela  
Chief Clerk  
Texas Commission on Environmental Quality  
Bldg. F, 3<sup>rd</sup> Floor  
Austin, Texas 78711-3087

**VIA HAND DELIVERY**

Re: Lower Neches Valley Authority's Application for Amendment to Certificate of  
Adjudication No. 06-4411

Dear Ms. Castañuela:

Enclosed for filing please find the original and eight copies of Requestor's Reply to Response to Hearing Request in the above-referenced matter. Please file stamp one copy and return it to me via my messenger.

If you have any questions, please do not hesitate to contact me at (512) 322-5856.

Sincerely,

Brad B. Castleberry

BBC/ldp  
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ENCLOSURES

cc: Mr. Monty Shank

**TCEQ DOCKET NO. 2009-0168-WR**

<b>LOWER NECHES VALLEY</b>	<b>§</b>	<b>BEFORE THE</b>
<b>AUTHORITY'S APPLICATION</b>	<b>§</b>	
<b>FOR AMENDMENT TO</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>CERTIFICATE OF</b>	<b>§</b>	
<b>ADJUDICATION NO. 06-4411</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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**REQUESTOR'S REPLY TO RESPONSE TO HEARING REQUEST**

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**TO THE HONORABLE COMMISSIONERS:**

**COMES NOW**, the Upper Neches River Municipal Water Authority (the “UNRMWA” or “Requestor”), and files this Reply to Response to Hearing Request in the above-referenced matter, in reply to the responses filed by the Executive Director (the “ED”) of the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) and the Lower Neches Valley Authority (“LNVA” or the “Applicant”). Pursuant to Section 55.255(b) of Title 30 of the Texas Administrative Code (“TAC”), UNRMWA's request for hearing should be granted by the Commission because (1) UNRMWA is an “affected person”; (2) the request complies with the provisions of Section 55.251; (3) the request was timely filed with the chief clerk; and (4) UNRMWA's request is made pursuant to a right to hearing authorized by law.

The ED properly determined that UNRMWA's hearing request should be granted because UNRMWA has a personal justiciable interest that will be impacted by the Applicant’s application in a way not common to the general public. Applicant’s contention that a contested case hearing should not be granted to UNRMWA because the impact by the Application is too speculative is unfounded. If the Application is granted, UNRMWA’s ability to provide water to its customers will be impaired, establishing an actual and specific injury that forms the basis of

its status as an affected person. As such, UNRMWA's hearing request should be referred to the State Office of Administrative Hearings ("SOAH").

## **I. INTRODUCTION**

Lower Neches Valley Authority ("LNVA" or "Applicant") applied to TCEQ on December 20, 2007 for an amendment to Certificate of Adjudication No. 06-4411 (the "Certificate") to modify Special Conditions 5.C. and 5.D. to change the subordination of the Certificate to apply only to existing water rights—before December 19, 2007 (the "Application"). In the Application, LNVA also requested to set a fixed priority date on all of LNVA's existing water rights.

On February 14, 2008, UNRMWA filed a timely request for hearing regarding the Permit. The ED provided its Response to Hearing Request August 3, 2009 and recommended UNRMWA's hearing request be granted. The Office of Public Interest Counsel ("OPIC") filed its Response to Request for Hearing on August 3, 2009 and recommended therein that the hearing request be granted.

In accordance with Section 55.254(f) of 30 TAC, UNRMWA, as requestor, files this Reply to Response to Hearing Request and requests that the Commission grant the hearing request for the reasons set forth below.

## **II. REPLY TO EXECUTIVE DIRECTOR'S RESPONSE**

### **A. General Hearing Request Requirements**

In compliance with Section 55.251, UNRMWA filed a timely hearing request in writing that (1) provided the relevant contact information required; (2) identified that person's personal justiciable interest affected by the application; and (3) clearly requested a contested case hearing.

### **B. Requirement of Affected Person Status and Personal Justiciable Interest**

Pursuant to Section 55.256(c), a number of factors are evaluated to determine whether a requestor qualifies as an “affected person.” In UNRMWA's hearing request, UNRMWA identified “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” UNRMWA set forth this personal justiciable interest by providing:

a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the activity in a manner not common to members of the general public. 30 TAC § 55.251(c)(2).

UNRMWA has a legal right under Certificate of Adjudication No. 06-3254, as amended, which authorizes the impoundment of state water in Lake Palestine and the diversion and use of up to 238,100 acre-feet of water per year for domestic, municipal, industrial, irrigation, mining and recreation purposes subject to a range of priority dates. Blackburn Crossing Dam, which forms Lake Palestine, is located in Anderson and Cherokee Counties approximately 240 river miles upstream of Town Bluff Dam that forms B.A. Steinhagen Lake that is the subject of this Application. If granted, the Application may impact UNRMWA's legal rights under Certificate of Adjudication No. 06-3254 in a manner not common to members of the general public by adversely impacting UNRMWA's ability to divert and use state water.

In addition to its legal right under Certificate of Adjudication No. 06-3254, UNRMWA also has a personal justiciable interest based upon its statutory powers, rights, privileges and functions to apply for additional water use permits in portions of the Neches River Basin that may be affected by the Application. UNRMWA expects to submit applications for additional water use permits within the Neches River Basin at or above the Weches Dam site, and intends to construct additional facilities as necessary to satisfy the growing demands of its present and

future water supply customers. Such facilities include the Fastrill Reservoir, a water management strategy recommended to meet projected needs in the 2006 Region C Regional Water Plan, the 2006 Region I Regional Water Plan, and the 2007 State Water Plan. Senate Bill 3, passed by the 80<sup>th</sup> Texas Legislature, designates the Fastrill Reservoir site as being of unique value for the construction of a reservoir. A preliminary review of the Neches Water Availability Model (“WAM”) shows that granting the Application would adversely impact the water supply available for the Fastrill Reservoir, which would impact UNRMWA in its ability to develop this water supply reservoir.

**C. Personal Justiciable Interest is not Speculative**

The Applicant alleges that UNRMWA does not qualify as an affected person because the injury asserted is too speculative, stating that “[i]t is well established that speculation about future contingencies is insufficient to establish standing as an affected person.” *See* Applicant’s Response to Request for Contested Case Hearing, page 10 (incorporating by reference the City of Lufkin’s arguments). This allegation is based solely on a 2008 case from the Amarillo Court of Appeals, *Texas Disposal Systems Landfill, Inc. v. Texas Commission on Environmental Quality*—begging the question as to how well established this argument actually is. 259 S.W.3d 361 (Tex. App.—Amarillo 2008, no pet.). A closer examination reveals that this case is not directly on point, addressing whether the Plaintiff had standing to file for judicial review of the Commission’s decision to modify a landfill permit that is located over 200 miles away from the Plaintiff’s landfill—not whether the Plaintiff should be granted a contested case hearing as an “affected person” under Chapter 55 of the 30 TAC. *Id.* at 363. It was quite clear in *Texas Disposal* that the need for multiple contingencies to occur before any injury to the Plaintiff was too hypothetical to establish a justiciable interest.

Texas Disposal believes that it can contest the regulatory decision because the manner in which the permit was modified “potentially” jeopardizes the trust relationship that exists between it and its neighbors in Austin, and that, in turn, “potentially” interferes with the normal operations of its landfill. *Id.*

The court determined that this potentiality was a purely speculative and hypothetical injury—that the method of modifying a landfill permit by a landfill 200 miles away from the Plaintiff *might* later be used by a competitor landfill that *might* interfere with the Plaintiff’s operations was not concrete enough to establish a justiciable interest for standing. *Id.*

Given the events that needed to occur for the Plaintiff in *Texas Disposal* to be injured, this case is distinguishable and not on point as to the determination of UNRMWA’s status as an affected person. “[A]n affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” 30 TAC § 55.256(a). The “justiciable interest” of an affected person may not be based upon a hypothetical injury. *See Daimler Chrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008) (citing to *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)).

UNRMWA has articulated its status as an affected person based upon a personal justiciable interest related to its legal rights, duties, privileges, powers, and economic interest in existing water rights and any amendments thereto and to future water rights that will be adversely affected by the Application. The fact that these amendments to existing water rights and future rights will be in the future do not make them purely speculative and hypothetical. The growing population served by UNRMWA will require additional water supplies—that is a fact—and the way to provide for such water is through water rights applications to amend existing water rights or for additional water rights. The Application seeks to remove a subordination clause that will no longer guarantee UNRMWA’s right—a *present and existing legal right*—to priority over the Applicant’s Certificate. Consequently, any subsequent amendment by the

Applicant to the Certificate for additional water supplies—which the Applicant obviously intends to seek, otherwise why remove the subordination special condition—will reduce total water supplies available for appropriation in the Neches River Basin. This is not hypothetical, potential, or speculative injury. By granting this Application, when, not if, the Applicant requests to amend the Certificate for additional water, UNRMWA will suffer a specific and actual injury by the reduction of water supply available to satisfy the needs of the population served by UNRMWA.

The Applicant further argues, in response to the City of Dallas’s hearing request, that the proposed Fastrill Reservoir (“Fastrill”) does not constitute a basis for affected person status. This argument is founded upon *ongoing* litigation regarding Fastrill. Although the Fifth Circuit recently upheld the United States Fish and Wildlife Service’s designation of a National Wildlife Refuge in the foot print of Fastrill, the project has yet to be foreclosed. *See City of Dallas v. Dep’t of the Interior*, 562 F.3d 712 (5th Cir. 2009). The City of Dallas and the Texas Water Development Board filed petitions for certiorari with the Supreme Court on June 10, 2009. Because Fastrill is not foreclosed, UNRMWA still has a personal justiciable interest related to an economic interest in Fastrill that will be affected by the Application. To have affected person status, the interest in Fastrill does not have to be related to a legal right in the form of an existing water right. The interest can be related to a legal right *or* a “duty, privilege, power, or economic interest affected by the application.” 30 TAC § 55.256(a). UNRMWA has a personal justiciable interest due to the specific injury that granting the Application will cause—reduction of water supply available for Fastrill. Given this specific injury, UNRMWA qualifies as an affected person not only because of the effect on amendments to existing water rights and future water rights, but also due to the effect the Application will have on Fastrill.

**D. Application violates Section 11.134 of the Texas Water Code**

Applications for a water rights amendment must comply with Chapter 11 of the Texas Water Code and accompanying TCEQ rules. Under Section 11.134(b)(3)(E),

[t]he commission shall grant the application *only if*...the proposed appropriation...addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement. TEX. WATER CODE § 11.134(b)(3)(E) (emphasis added).

The Application submitted by LNVA fails to comply with Section 11.134(b)(3)(E). Data supporting the 2007 State Water Plan show that Applicant has existing supplies, without the requested amendment, that are 578,020 acre-feet per year in excess of its year 2060 obligations based on water demand projections approved by the Texas Water Development Board. According to the 2007 State Water Plan, Applicant does not have a water supply need within the planning period. The five potential water management strategies evaluated for Applicant in the Region I Regional Water Plan *do not* include the amendments requested in the Application. In fact, the amendments sought by the Application are clearly in conflict with the approved Region I Regional Water Plan inasmuch as they would reduce current and future water supplies identified for UNRMWA. The additional impairment the Application will have on UNRMWA's ability to meet its projected water demands further demonstrates its personal justiciable interest as an affected person and how it will be affected in a manner not common to the general public.

Because UNRMWA's hearing request complies with the provisions of Section 255(b)(2) of 30 TAC, the Commission should concur with the determinations of both the ED and OPIC and grant UNRMWA's request for hearing.

**III. REQUEST FOR CONSOLIDATION**



UNRMWA hereby requests the Commission, in referring this matter to SOAH, also consolidate this matter with TCEQ Docket No. 2009-0506-WR to promote efficiency and serve the interests of judicial economy. TCEQ Docket No. 2009-0506-WR is an application by the City of Lufkin to amend Permit No. 4411F, the same permit LNVA seeks to amend in the Application with both applications requesting the exact changes and having the exact same hearing requestors. This was part of the basis for the Commission's granting a continuance on April 13, 2009 of the Commission's consideration of the Application. Furthermore, given the similarity between the applications, a decision on one application could unfairly prejudice the decision on the other application. Consequently, UNRMWA respectfully requests that the Commission consolidate these two matters for the above-stated reasons.

#### **IV. CONCLUSION**

For the reasons set forth above, the Upper Neches River Municipal Water Authority respectfully requests that the Commission grant UNRMWA's contested case hearing request and refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

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By:   
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**ATTORNEYS FOR UPPER NECHES RIVER  
MUNICIPAL WATER AUTHORITY**

## **CERTIFICATE OF SERVICE**

I hereby certify that on this the 17<sup>th</sup> day of August, 2009, a true and correct copy of the foregoing was sent via first-class mail, electronic mail, facsimile, or hand-delivery to the following persons:

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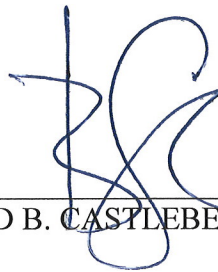
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